

Kazem Habibi Hassan v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-50-03 OF 2012
MOHTARUDIN BAKI, HAMID SULTAN AND ZAKARIA SAM JJCA
14 JULY 2014

Evidence — Presumption — Drug trafficking — Accused caught wearing abdominal girdle containing large amount of methamphetamine at airport — Evidence at trial showed accused’s DNA present on plastic containing drugs within girdle — Accused denied knowledge of drugs saying friend in Teheran told him girdle contained computer crystals for sale in Malaysia — Accused unable to explain how his DNA was on plastic containing the drugs — Trial court inferred accused must have handled plastic himself and therefore had knowledge of drugs — Whether accused failed to rebut presumption of knowledge under s 37(d) of the Dangerous Drugs Act 1952

The appellant was found guilty and sentenced to death by the High Court on a charge of trafficking in 1,394g of methamphetamine at the baggage collection centre at the arrival hall at Kuala Lumpur International Airport. After noticing that the appellant was entering and exiting a toilet several times after collecting a bag, customs officers at the airport approached the appellant and took him to the narcotics office for a body search which revealed he was wearing an abdominal girdle containing the drugs. The sole issue raised by the appellant in the instant appeal against his conviction and sentence was that he had no knowledge about the drugs. To support that contention, the appellant claimed he was requested by a friend (‘Mehdi’) in Teheran to bring with him computer crystals for sale to a buyer in Malaysia. The appellant claimed that although he did not see the crystals himself, Mehdi told him they were placed within the girdle to be worn around the waist for the purpose of evading tax. The trial court found that as the prosecution had proven the appellant had custody and control of the drugs, his knowledge of the drugs could be presumed under s 37(d) of the Dangerous Drugs Act 1952. A DNA chemist testified at the trial that the appellant’s DNA was found on the transparent plastic within the girdle which contained the drugs as well as on the sides of the girdle raising the inference the appellant must have handled the plastic containing the drugs. The trial court held that although the appellant had raised the existence of Mehdi during the prosecution’s case, it did not amount to anything more than a denial because no details of Mehdi were given to enable police to investigate the matter further.

Held, dismissing the appeal:

- A (1) The most damaging part of the defence's story was the failure to explain to the satisfaction of the trial court how the appellant's DNA was found on the transparent plastic packet that contained the drugs (see para 6(b)).
- B (2) There was sufficient material in the evidence to support the trafficking charge against the appellant and the view taken by the trial court on the relevant issues was a reasonable view of the evidence on record and the court had followed *Radhi's* direction and rightly applied the maximum evaluation and beyond reasonable doubt tests. The conviction of the appellant was safe (see paras 7–8).

C

[Bahasa Malaysia summary]

- Perayu didapati bersalah dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas tuduhan mengedar dadah methamphetamine sebanyak 1,394g di pusat pengambilan bagasi di balai ketibaan di Lapangan Terbang Antarabangsa Kuala Lumpur. Selepas memerhati bahawa perayu masuk dan keluar tandas beberapa kali selepas mengambil beg, pegawai kastam di lapangan terbang mendekati perayu dan membawa dia ke pejabat narkotik untuk carian badan yang menunjukkan dia memakai korset perut mengandungi dadah.
- D Satu-satunya isu yang dibangkitkan oleh perayu dalam rayuan ini terhadap sabitan dan hukuman adalah bahawa dia tidak mempunyai pengetahuan mengenai dadah tersebut. Untuk menyokong hujahan tersebut, perayu mendakwa yang dia diminta oleh seorang kawan ('Mehdi') di Teheran untuk membawa dengannya kristal komputer untuk jualan kepada pembeli di
- E Malaysia. Perayu mendakwa walaupun dia tidak melihat kristal itu sendiri, Mehdi memberitahu dia yang ia diletakkan di dalam korset yang dipakai di pinggang bagi tujuan untuk mengelak cukai. Mahkamah perbicaraan mendapati memandangkan pihak pendakwaan telah membuktikan perayu mempunyai kawalan dan jagaan dadah tersebut, pengetahuannya mengenai dadah boleh dianggap di bawah s 37(d) Akta Dadah Berbahaya 1952. Ahli kimia DNA memberi keterangan ketika perbicaraan bahawa DNA perayu didapati atas plastik lutsinar dalam korset yang mengandungi dadah dan juga di tepi korset membangkitkan inferens yang perayu mesti mengendalikan plastik yang mengandungi dadah tersebut. Mahkamah perbicaraan memutuskan bahawa walaupun perayu telah membangkitkan kewujudan Mehdi semasa kes pendakwaan, ia tidak menjumlahkan kepada apa-apa yang lebih daripada penafian kerana tiada butir-butir mengenai diberikan untuk membolehkan polis untuk menyiasat perkara tersebut selanjutnya.

I **Diputuskan**, menolak rayuan:

- (1) Bahagian yang mengganggu pembelaan adalah kegagalan menjelaskan untuk memuaskan mahkamah perbicaraan bagaimana DNA perayu didapati atas paket plastik lutsinar yang mengandungi dadah tersebut (lihat perenggan 6(b)).

- (2) Terdapat material yang mencukupi dalam keterangan untuk menyokong tuduhan mengedar terhadap perayu dan pandangan yang diambil oleh mahkamah perbicaraan atas isu yang relevan adalah pandangan munasabah keterangan atas rekod dan mahkamah telah mengikut arahan kes *Radhi* dan secara betul mengguna pakai penilaian maksimum dan ujian melampaui keraguan munasabah. Sabitan perayu adalah selamat (lihat perenggan 7–8).]

Notes

For cases on drug trafficking, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2438–2452.

Cases referred to

Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)

PP v Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)

Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(1)(a), (2)

Appeal from: Criminal Trial No 45A-614 of 2010 (High Court, Shah Alam)

Rajinder Singh (Rajinder & Goh) for the appellant.

How May Ling (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's appeal in respect of conviction and sentence of death for drug trafficking came up for hearing on 6 May 2014 and upon hearing we dismissed the appeal on the same day. My learned brothers Mohtarudin bin Baki JCA and Zakaria bin Sam JCA have read the draft judgment and approved the same. This is our judgment.

[2] The appellant was charged as follows:

Bahawa kamu pada 11 haribulan Mac 2010, jam lebih kurang 10.30 malam di dalam kawasan Tuntutan Bagasi, Aras 3, Ketibaan MTB, Balai Ketibaan Kuala Lumpur International Airport (KLIA) di dalam daerah Sepang, di dalam Negeri Selangor Darul Ehsan didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 1394 gram dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

- A** [3] The petition of appeal, inter alia, reads as follows:
- (1) The learned Judge erred in law and fact by stating that counsel for the appellant did not dispute custody, control and knowledge.
- B** (2) Even if so, it was impossible for the counsel to not dispute 'knowledge'.
- (3) The learned Judge erred in law and fact by firstly stating that custody, control and knowledge were not disputed but then went on to discuss knowledge in Her Lordship's grounds of judgment.
- C** (4) The learned Judge erred in law and fact by making a finding of knowledge when the drugs were found in the girdle on the appellant's person.
- (5) The learned Judge erred in law and fact by failing to consider the defence case that the appellant thought the crystal substances were computer related and it was hidden to avoid taxes.
- D** (6) The learned Judge erred in law and fact by relying on the case of *Parlan bin Dadeh v. P.P.*
- (7) The learned Judge erred in law and fact in making a finding of knowledge when the plastic packet containing the drugs had the appellant's DNA on it.
- E** (8) The learned Judge erred in law and fact by failing to appreciate the defence case that it was Mehdi who instructed the appellant to send the crystals to Malaysia and to evade tax.
- F** (9) The learned Judge erred in law and fact by relying too much on the testimony of SP4 who mostly testified that he could not remember or that he did not know. Furthermore, SP4 did not testify as to the amount of money confiscated from the appellant which would show the length of time the appellant was to remain in Malaysia.
- G** (10) The learned Judge erred in law and fact by failing to consider the appellant's reaction who broke down and cried when he was informed that the crystals were drugs, in contradiction with SP4's testimony that the appellant appeared normal.
- (11) The learned Judge erred in law and fact by making a finding that no information was supplied to the police on Mehdi when the appellant testified that he had given Mehdi's telephone number to the police and had in fact handed over his own telephone which contained Mehdi's number.
- H**
- I** (12) The learned Judge erred in law and fact by failing to consider the authorities submitted by the defence where it was held that in the case of knowledge, the possessor must be aware of his possession, the nature of the thing possessed and have the power of disposal.
- (13) The learned Judge erred in law and fact by failing to consider that there was no evidence to show the presence of anyone to fetch or receive the drugs from the appellant.

(14) The learned Judge erred in law and fact by stating that knowledge was not disputed. A

BRIEF FACTS

[4] The appellant was arrested at the KLIA Narcotic's Office. Prior to his arrests, upon arrival at the international airport, the appellant was seen picking a maroon bag (exh P15) and going in and coming out of the toilet, two or three times. This triggered suspicion and SP4 (customs officer) then took the appellant to the narcotics office. SP4 conducted a search on the appellant's body where drugs were discovered in the 'girdle' the appellant had worn on the appellant's stomach area. B C

[5] Learned counsel for the appellant before us informed us that there was only one issue, relating to knowledge. The appellant's story to disclaim knowledge can be summarised as follows: (a) he was a chef in Tehran; (b) his purpose of visit to Malaysia was to look for a job; (c) his friend 'Mehdi' had asked him to take computer crystals to be sold to a buyer in Malaysia; (d) it was Mehdi who placed the computer crystals inside the girdle; (e) he did not see the crystals or contents of the packet; and (f) he wore the 'girdle' to evade tax. D E

[6] We have read the petition of appeal and appeal records and the submissions of learned counsel and learned deputy public prosecutor. After much consideration upon the submission of learned counsel for the appellant, we take the view that the appeal must be dismissed. Our reasons, inter alia, are as follows: F

- (a) the learned judge had written a 26 page judgment, setting out the facts and the law in detail and giving reasons why the appellant's story did not cast doubt on the prosecution case notwithstanding the fact that the burden is on the appellant to rebut trafficking on the balance of probabilities; G
- (b) the most damaging part of the defence version was the failure to explain how the DNA of the appellant was found on the transparent plastic bag that contained the drugs to the satisfaction of the court. That part of the judgment of the learned trial judge relating to 'knowledge' and 'DNA' reads as follows: H

Since custody and control was proven, knowledge is presumed (s 37(d) of the Act). However, it can also be inferred from the circumstances. It is not likely that the accused did not know the content that was in the girdle wrapped around his abdomen. In the Federal Court case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 it was held that 'proof of knowledge is very often a matter of inference which varies from case to case'. It would be sufficient for the prosecution to prove facts from which it would properly be inferred that I

- A the accused had the necessary knowledge.
- There is no reason to doubt the evidence of SP4 and SP8, the head and a member of the ambush team.
- B The DNA result obtained by SP6 (the DNA chemist) showed that the DNA of the accused was found on the transparent plastic that contained the drugs. This would also go to show that the accused had handled the plastic containing the drugs. The DNA was also found at the sides of the girdle,
- (c) in addition, the learned judge after going through in detail the defence story concluded as follows:
- C From the submission of the learned deputy public prosecution it is very clear that the evidence of the accused is full of gaps and questions unanswered. So how can the evidence ever be probable, possible or logical that can cast a doubt in the prosecution's case.
- D Admittedly, the defence did raise the issue of Mehdi in the prosecution case but no details of the said person was given to enable the police to carry out investigations on the name mentioned — *Teng Howe Seng v Public Prosecutor* [2009] 3 CLJ 733. So even though the defence was raised in the prosecution case it amounts to a denial which Raja Azlan Shah J (as His Majesty then was) said in the Federal Court decision of *D A Duncan v Public Prosecutor* [1980] 2 MLJ 195 the High Court came, in our view, to the correct conclusion that his denial did not cast a doubt on the prosecution case against the appellant.
- E Since the defence was not able to cast a doubt in the prosecution's case and on a maximum evaluation of the evidence the prosecution had proven a case beyond reasonable doubt against the accused, the accused was found guilty as charged, convicted and sentenced to the only sentence provided for by law for the offence charged ie death.
- F
- G [7] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there is sufficient material to support a charge for trafficking and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi's* direction and rightly applied the maximum evaluation and beyond reasonable test (see *Public Prosecutor v Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; and *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).
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- I [8] In the instant case we are satisfied that the conviction is safe and the appeal must be dismissed.
- [9] We hereby order so.

Appeal dismissed. A

Reported by Ashok Kumar

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